Filed 4/30/19 Los Angeles Academy of Arts and Enterprise v. Denley Investment & Management Co. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LOS ANGELES ACADEMY OF ARTS AND ENTERPRISE, Plaintiff and Respondent, v. DENLEY INVESTMENT & MANAGEMENT COMPANY, INC., et al., Defendants and Appellants.	B283123 (Los Angeles County Super. Ct. No. BC473622)

APPEAL from a judgment of the Superior Court of Los Angeles, Barbara M. Scheper, Judge. Affirmed in part and reversed in part.

Areg A. Sarkissian; Benedon & Serlin, Gerald M. Serlin and Wendy S. Albers for Defendants and Appellants.

Young, Minney & Corr, William J. Trinkle and Kathleen M. Ebert for Plaintiff and Respondent.

The respondent charter school rented an office building for its school from its now former landlord, one of the appellants. The charter school brought breach of contract, tort, and related causes of action against its former landlord and the landlord's management company. Among other deficiencies, the charter school asserted the building had an inoperative heating, ventilation, and air conditioning (HVAC) system. Following a bench trial, the trial court found in favor of the charter school and awarded $2,201,032 in "deficient facilities" damages; $400,365 in lost rental value damages; and $1,207,500 in attorney fees.

On appeal, appellants make five arguments. First, the trial court erred in not enforcing the parties' conditional settlement because appellants had satisfied all the conditions required for a dismissal under that settlement agreement. Accordingly, the trial court should not have conducted a trial at all. Second, the trial court erred in interpreting a purported exculpatory clause in the lease regarding consequential damages that appellants assert precluded recovery of deficient facilities damages. Third, the award of lost rental and deficient facilities damages was duplicative. Fourth, substantial evidence did not support the deficient facilities award, and the lost rental damages award failed because the charter school's damages expert did not rely on proper comparables data. Finally, appellants assert the trial court's refusal to provide a statement of decision after trial was prejudicial.[1]

---

[1] Appellants initially attacked the attorney fees award because it did not reflect a rent credit of $175,000. As noted *post*, since appellants filed their opening brief, that issue is now moot.

We reverse the award of deficient facilities damages because there was not substantial evidence to support the expert's assumption that the school lost enrollment because of the inoperative HVAC system. We, however, reject appellants' attack on the award of rental value damages. In light of our reversal of the award of deficient facilities damages, we do not address whether the trial court erred in interpreting the lease's purported exculpatory language regarding consequential damages or appellants' claim of duplicative damages. For the reasons detailed below, we conclude appellants fail to show the trial court erred in denying appellants' motion to enforce the settlement agreement. We also conclude the absence of a statement of decision did not prejudice appellants.

In sum, we reverse the deficient facility damages award and affirm the judgment in all other respects.

BACKGROUND

1. The Parties

Respondent Los Angeles Academy of Arts and Enterprise (Academy) is a public charter school. Academy serves students in grades 6 through 12.[2] The school operates as a nonprofit benefit corporation.

Appellant La Fayette Associates is the owner of 600 South Lafayette Park Place, the building in which Academy was located. Appellant Denley Investment Management Company,

---

[2] Academy indicates that it added a new grade level each year until 2011–2012, when it served all six grades, and for purposes of this appeal, we accept this representation.

Inc. (Denley) leased the building to Academy. The building was not built as a school; it was an office building.

Academy moved into the 600 South La Fayette Park Place location in 2006. The school was not the only tenant in the building. The HVAC system in the building dated back approximately to the 1950's.

2. More on Academy

A charter petition is a document that describes the purpose of the charter school, its governance structure, curriculum, and focus, and the number of students the school seeks to enroll. The Los Angeles Unified School District granted Academy its original charter and renewed it three times.

Academy's charter petitions stated that Academy intended to enroll 625 students.[3] The school's actual enrollment was as follows: 325 students for the 2008-2009 school year; 373 students for the 2009-2010 school year; 390 students for the 2010-2011 school year; 412 students for the 2011-2012 school year, 403 students for the 2012-2013 school year, and 386 students for the 2013-2014 school year.

Daily attendance payments from the state are the principal source of funds for charter schools. The state pays a school only for those students who actually attend school. Schools also

---

[3] Although the record contains testimony that the original charter stated an intention to enroll 625 students, the parties as well as Academy's expert assumed all of the renewal petitions included this number. Like the parties, we assume that this intended enrollment was included in all of Academy's renewal charter petitions.

receive a small percentage of their income from the lottery and from county tax revenues.

When it started, Academy was the only charter school in its neighborhood; at the time of trial, there were several. The neighborhood surrounding Academy had gang activity. Ninety-two percent of students at the school qualified for the free or reduced lunch program.

3. The Parties' Lease

On November 21, 2008, Academy leased approximately 30,000 square feet at 600 South La Fayette Park Place from Denley (the premises). The lease term was seven years with an option to extend for an additional five years.

The lease provided that Denley "agrees to maintain the mechanical, electrical, life safety, plumbing, sprinkler, safety (including locking systems for all doors), heating, ventilating and air condition ('HVAC') systems . . . in good condition and repair."

When it signed the 2008 lease, Academy accepted the conditions of the premises except for items listed in exhibit B to the lease. Exhibit B included the following: "The HVAC has not yet been repaired to full working order. Air flow in all parts of the building, including classrooms, lavatories, offices and hallways continues to be deficient. Installation of thermostats is required."

Paragraph 18c of the lease provided: "Under no circumstances shall either Lessor or Lessee be liable for any indirect, incidental or consequential damages and/or lost profits howsoever arising, including but not any claim or action based upon breach of contract or tort." Appellants argue that for this clause to make sense, the trial court should have interpreted it to include the phrase "limited to" between the "not" and "any" in the

last phrase of the clause. In light of our reversal of the only consequential damages the trial court awarded, we do not address this contention.

The lease also contained an attorney fee provision: "In the event of any dispute between the parties to this lease, the prevailing party in connection with the resolution of any such dispute, whether by arbitration, litigation, or otherwise, shall be entitled to recover an award of reasonable attorney's fees in addition to any other relief which such party obtains."

4. Lawsuit

Academy sued appellants in 2011. The first amended complaint (FAC) alleged causes of action for breach of contract, breach of the implied covenant of quiet enjoyment, constructive eviction, nuisance, negligence, specific performance, and declaratory relief.

Academy alleged the premises lacked properly functioning heating and air conditioning. As a result, Academy sometimes had to dismiss students before the completion of the school day. Academy alleged that other tenants in the building disturbed its quiet enjoyment and possession of the premises when the tenants entered the premises without Academy's consent. Academy further alleged that vermin creating unsafe conditions infested the premises. Academy sought damages, specific performance, and declaratory relief.

5. Settlement Agreement

On November 18, 2013, the parties entered into a conditional settlement agreement. Ultimately the court denied appellants' motion to enforce the settlement agreement, concluding that appellants had not satisfied the conditions for

dismissal of the lawsuit. We provide additional background relevant to the parties' settlement agreement and the denial of appellants' motion to enforce it in our discussion section.

6. Trial

Trial commenced in October 2015. At trial, Academy did not pursue damages postdating the date of the settlement agreement. Every witness at trial, including the only witness who testified for the defense, agreed that the premises lacked an adequate HVAC system.

a. *Moctesuma Esparza*

Moctesuma Esparza, the cofounder and chairman of Academy's board, testified that he believed the conditions of the premises prevented Academy from reaching its target goal of 625 students. Parents and students complained about the condition of the premises. One student was hospitalized because of the heat inside the school. In the 2010–2011 school year, the school had to close early for more than a week because the air conditioner was not functional.

Esparza testified that rats and other vermin infested the premises, a condition that improved slightly after a basement tenant left the building. He further testified that there were deficiencies in other areas such as glass doors that worked inconsistently, clogged toilets, exposed electrical wires, broken windows, and graffiti. Esparza reiterated that there were always problems with the air conditioning.

Esparza also testified that students left the Academy at a higher rate than at surrounding schools, and Academy personnel "had to exert ourselves in recruitment and do everything we could to compensate for the building deficiencies by

strengthening everything else that we could about the school." When asked if he was familiar with the projections for student enrollment described in Academy's charter petitions, Esparza testified "I've seen them. I have not studied them." He stated the projections were "derived from our enrollment, our daily attendance, our charter, and the occupancy of the building."

On cross-examination, Esparza acknowledged that students left for "various reasons." "Some of them left the country. Some of them went to a different school. Some of them were pulled out by their parents." Esparza also testified that he was a pro bono consultant to another school that almost lost its charter because the school had not reached its enrollment goals.

b. *David Calvo*

David Calvo began working for the Academy in 2010 and became the principal in 2013. According to Calvo, the HVAC at the premises worked only for "brief moments." In addition to one student who required hospitalization for heat stroke, according to Calvo, the heat may have facilitated the spread of tuberculosis in the school. Calvo's office regularly was too warm in the summer and too cold in the winter. The Academy sometimes dismissed students early because of the heat, and teachers sometimes held class on the patio for the same reason.

Fifteen to 20 parents told Calvo that they were withdrawing their child from the school because of the premises's condition. Over a dozen teachers left the school because of intolerable working conditions.

Calvo provided information to Dr. Barbara Luna, an expert witness. He documented Academy's cost to service the students. Calvo also provided information on the "student shortfall" based on the projected enrollment from the school's charter petitions.

According to Calvo, the projected enrollment described in Academy's petitions was based on neighborhood trends. Charter schools sometimes surpassed their projections and sometimes fell short of them. According to Calvo, "in theory, once you build to a certain capacity, then you should be able to provide a programming to meet that need." Calvo also documented the funding that the school expected the state to pay. Calvo testified the Academy lost students every year as follows: 4 in 2008–2009; 70 in 2009–2010; 78 in 2010–2011; 56 in 2011–2012 and 40 in 2012–2013.

Calvo testified that two nearby charter schools service the same age of students. Calvo admitted that Academy faced competition from other schools. He acknowledged, "I can't speak to what's on people's minds when they withdraw."

c. *Dr. Barbara Luna*

Dr. Barbara Luna, a forensic accountant and certified general real estate appraiser, testified as an expert witness.

She testified that it was standard in the industry to use a program called "costar" to gather information on real estate. She reviewed information from office buildings within a mile of the premises. Dr. Luna compared the premises to office buildings of similar size with no air conditioning. She calculated the cost of rent for the same square footage rented by Academy at 600 South Lafayette Park Place. Dr. Luna calculated that from 2009 through 2013, Academy overpaid $400,365 in rent because it paid for an air-conditioned building and received one that was not air conditioned. Dr. Luna added 7 percent prejudgment interest for a total amount of $509,625 in damages for overpaid rent. Dr. Luna stated she based these damages on her conclusion

that "too much rent is being charged for a property, in essence, with poorly functioning or no air-conditioning."

In addition to the damages Dr. Luna calculated for overpaid rent, Dr. Luna calculated $2,201,032 in "deficient facility" damages. Appellants objected to the testimony on the ground that there was no foundation, and the trial court overruled the objection.

Dr. Luna based the deficient facility damages on Academy's loss of revenue from students not attending the school, which lack of attendance Dr. Luna assumed was due to the poor condition of the premises. In other words, she calculated the amount of "deficient facility damages" based on the "shortfall in student attendance." To calculate this shortfall, Dr. Luna: "[L]ooked at first the student capacity information. And that we got from LAAAE [Academy] renewal charter . . . petitions. [¶] We then looked at the expected student enrollment, ... And that's based upon the renewal charter . . . petitions. And that gave us the figures for the expected student capacity." Academy also provided Dr. Luna with the actual enrollment numbers.

Dr. Luna explained: "The expected student enrollment is what should have happened, compared to what actually happened is the actual student enrollment. The differential between the two is the shortfall." Once she calculated the shortfall, Dr. Luna multiplied the shortfall number by "the attendance factor." Academy states that "[t]he attendance factor is the student attendance percentages (i.e., the average percent of students that attended class on a daily basis)." If a child does not attend school on a particular day, the school does not receive revenue for that child on that day.

Dr. Luna multiplied the shortfall in student attendance by the revenue the state would have paid the school for each such lost student. Then she calculated the incremental cost increase and subtracted that amount from the total. Dr. Luna testified that she had no information linking appellants' conduct to the shortfall in attendance. She admitted she did not analyze whether the HVAC system led to a decline in student enrollment.

d. *Other Witnesses Called by the School*

Nicole Pasten, who worked in the building where the school was located, testified that there was no cooling system. The heat and air conditioning never worked. She observed rats and cockroaches inside the building.

Amanda Cheek, a former teacher at Academy, testified that the school was either too cold or too warm. The temperature affected the students' ability to focus. Cheek observed mice and cockroaches. Cheek, however, testified that she was not aware that any student had withdrawn from the school because of the temperature in the classrooms.

Ericka Solis, an administrative assistant at the Academy, also testified the air conditioning and heat did not work. She heard students yell because of rodents and observed roaches.

Hector Orci, a member of Academy's board, testified that teachers complained that the premises were too hot or too cold. There were reports of rodents throughout the school.

Paul Makris testified as a school construction expert about the condition of the HVAC system in November 2013. The boilers appeared inoperable. The classrooms lacked air circulation. Some rooms had no ventilation. Some of the ducts leaked. The cafeteria had no air circulation. The HVAC system and ductwork

were 50 to 60 years old. In sum, the majority of the equipment had "outlived its useful life."

e. *Defense Witness David Bolour*

David Bolour testified for the defense. He worked for Denley since 2004. He acknowledged that Denley was responsible for servicing and maintaining the premises's HVAC system. He stated that Denley regularly spent money to service the HVAC system. He acknowledged pest control issues, and testified that Denley contracted with pest control companies in an effort to resolve them.

Bolour was aware that a student had suffered heat stroke because the HVAC system did not function. Bolour acknowledged that in November 2013, a repair company told him that the air conditioning system had exceeded its useful life. The existing air flow was insufficient to meet the needs of the classrooms. Additionally, the system lacked controls necessary to function properly.

No other witness testified for appellants. Appellants proffered no damages expert.

7. Trial Court's Findings and Orders

After trial, the trial court stated, "This was ridiculous year after year putting a band-aid on this problem that was not being corrected." The trial court also noted that no defense witness contradicted "the credible testimony of all the plaintiff's witnesses." "This system never worked from the time the lease was entered into in 2008 . . . ." "It still doesn't work."

The trial court found Dr. Luna's analysis "persuasive and credible." The trial court then awarded damages for the breach of contract, breach of the covenant of quiet enjoyment, and private

nuisance causes of action. Specifically, the trial court awarded $400,365 for 2008 through 2013 in lost rental damages; the court added $109,260 in prejudgment interest.

The trial court also found credible Dr. Luna's analysis of "deficient facilities" damages. The court credited Dr. Luna's reliance on "expected enrollment" as compared to "actual enrollment." The trial court explained: "[W]hile the court was concerned somewhat these numbers are speculative, I think that she [Dr. Luna] has provided an adequate basis for the opinion that people just leaving for a variety of reasons, moving, et cetera, would be taken into account by virtue of the fact that the expected enrollment was at 90 percent of the capacity. Anything that was below that could be properly attributed to the fact the reputation of the school was suffering because of the issues that have been presented at trial. Primarily, I think, the HVAC system, also the pest factor and the graffiti factor." The trial court awarded $2,201,032 in damages under this theory.

Initially, the trial court ordered specific performance on remediation of the pest control deficiencies and repair of the HVAC system. The trial court also threatened to appoint a receiver because the HVAC system was not yet functional. Ultimately, specific performance became moot when Academy moved away from the premises. However, the trial court noted that "even post-judgment in this case, we couldn't get the thing [HVAC] fixed."

The trial court's final judgment, dated February 28, 2017, awarded $400,365 in lost rental value plus prejudgment interest in the amount of $206,107.51. For deficient facility damages the court awarded $2,202,032 and $148,164.12 in prejudgment interest. The trial court did not explain why it revised the

prejudgment interest award. The trial court subsequently awarded attorney fees in the amount of $1,207,500. The trial court denied appellants' motion for a new trial, except that it granted appellants' request for a statement of decision. The trial court subsequently reversed its order granting the filing of a statement of decision. Appellants timely appealed.

DISCUSSION

A. The Trial Court Properly Denied Appellants' Motion to Enforce the Settlement Agreement

Appellants contend the trial court erred in not enforcing the conditional settlement agreement and dismissing the lawsuit because appellants had satisfied all conditions for obtaining such a dismissal. We conclude there was no error.

1. Additional background

As noted above, the parties entered into a settlement agreement on November 18, 2013. Academy agreed to request dismissal with prejudice of the lawsuit if appellants complied with conditions enumerated in paragraphs three and five of the agreement including the following: repair of the HVAC to commence no later than January 6, 2014; replacement of a boiler no later than December 15, 2013; repair of ducts no later than January 6, 2014, replacing or upgrading the "brain/control systems" to the HVAC, installation of thermostats, and best efforts to remove the basement tenants by no later than January 1, 2014.

The parties further agreed that "certain impediments, issues, construction constraints, governmental agency and/or permitting requirements/constraints, and/or other matters may

arise in connection with Denley's performance of its obligations under this Agreement. As a result, the Parties hereto, and each of them, agree to engage in good-faith discussions on all issues relating to the performance of and adherence to the parties' respective obligations under this Agreement, and to submit any dispute which has not been resolved through meeting and conferring to mediation . . . . *Such efforts to resolve issues through conferring and/or mediation do not alter the time requirements or performance obligations of this Agreement*." (Appellants repeatedly quote the foregoing provision, but omit the italicized language.) At Academy's request, the trial court continued the hearing on the order to show cause re: dismissal several times.

In May 2015, the court issued an order stating, "Defendant's counsel believes that the settlement agreement has been satisfied." "Plaintiff's counsel does not agree." The court placed the case back on the active calendar.

In August 2015, appellants filed a motion to enforce the settlement and sought dismissal of the lawsuit. The motion sought to "enforce the terms of the settlement, seek dismissal of the entire action with prejudice and to refer any remaining issues to private mediation and for other and further relief." (Capitalization omitted.) Appellants argued: "Denley performed its obligations under the terms of the settlement agreement." In a declaration in support of its motion, Mehdi Bolour, the president of Denley, represented that Denley completed its obligations under the settlement agreement and spent $222,540 to repair the premises. Bolour attached invoices to his declaration. The trial court sustained evidentiary objections to most of this evidence. Appellants do not challenge these evidentiary rulings on appeal.

Appellants did not argue that Academy waived strict compliance with the deadlines set forth in the settlement agreement. They so contend, however, on appeal.

Academy opposed the motion to enforce the settlement agreement. Academy argued that because appellants materially breached the agreement, the settlement agreement was not enforceable. Academy proffered evidence that appellants had not completed or timely completed the repairs and tasks that were the conditions to dismissal of the lawsuit. Principal Calvo's declaration indicated that the classrooms were warm, and the HVAC was not functioning properly.

In its reply, appellants argued that Denley complied with the conditions of dismissal set forth in the settlement agreement. Appellants also contended Academy benefitted from the settlement agreement and was in the process of negotiating a new lease with appellants. Appellants further argued "[a]ll minor issues can be referred to mediation."

Following a hearing, the trial court denied appellants' motion to enforce the settlement. It appears the trial court declined to consider new evidence presented in appellants' reply; appellants do not challenge this evidentiary ruling on appeal. We observe the trial court's order does not describe its reasons for denying the motion, and the hearing was not reported.

2. Appellants fail to demonstrate the trial court erred in denying their motion to enforce the settlement agreement

We review the trial court's denial of a motion for entry of judgment enforcing a settlement agreement for substantial

evidence.[4] (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911.) Appellants fail to demonstrate that they completed the conditions for dismissal of the lawsuit. Significantly, the trial court sustained objections to almost all the evidence appellants presented in support of their motion to enforce the settlement. Appellants' unsupported conclusory statement that they complied with the terms of the settlement agreement is insufficient to demonstrate compliance with the terms of the agreement.

On appeal, appellants cite no admitted evidence supporting their argument. For that reason alone, appellants demonstrate no error on appeal. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 ["We proceed to consider the issues raised on appeal, cognizant of appellants' obligation to provide an adequate record to demonstrate error as well as our obligation to presume that the decision of the trial court is correct absent a showing of error on the record."])

Additionally, appellants recognize that they complied with almost none of the deadlines set forth in the settlement agreement. Nevertheless, they argue that Academy waived strict compliance with the deadlines in the settlement agreement by requesting continuances from the trial court of the orders to show cause regarding dismissal. Appellants failed to raise this issue in their motion to enforce the settlement and therefore forfeited it. By failing to raise the issue in their motion to enforce the

---

[4] Appellants argue that specific questions such as the interpretation of the terms of a settlement agreement are subject to de novo review. Appellants, however, fail to identify any provision in that agreement that the trial court incorrectly interpreted when it denied appellants' motion to enforce the settlement agreement.

settlement below, appellants could not have met their burden to prove that the parties intended to waive enforcement of the settlement agreement's deadlines. (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 897 ["[T]he party urging waiver has the burden of proving it"].)

For these independent reasons, appellants demonstrate no error in the trial court's denial of their motion to enforce the settlement agreement.

B. The Deficient Facility Damages Award Is Not Supported By Substantial Evidence

Appellants argue that the trial court's award of deficient facilities damages was not supported by substantial evidence. Academy responds, "[S]ubstantial evidence supports the reasonableness of the deficient facility damages calculation as LAAAE's [Academy's] enrollment projections were attainable but for the harm caused by Denley." (Capitalization and underlining omitted.) We conclude appellants are correct and therefore reverse the trial court's award of the deficient facilities damages.

Dr. Luna provided expert testimony on deficient facilities damages and used information Principal Calvo provided in arriving at her opinions. Dr. Luna calculated expected student enrollment based on Academy's charter petitions. Dr. Luna testified that she "looked at the expected student enrollment, which was at 90 percent of capacity. And that's based upon the renewal charter . . . petitions. And that gave us the figures for the expected student capacity." Dr. Luna then based the damage award on the difference between the expected student enrollment from Academy's charter petitions and the actual student enrollment, and then subtracted the cost of servicing the resulting shortfall in students. Dr. Luna's damages award

therefore assumed that but for the deficiencies in the premises, Academy would have reached its expected student enrollment described in its charter petitions.

Both parties analogize the funding Academy receives from the state to profits. For example, Academy argues: "As a charter school, LAAAE [Academy] is operated by a non-profit entity and thus does not have 'profits' as a traditional for-profit business would. [Citation.] But such lost profit damages are analogous here as they account for the funding that LAAAE [Academy] reasonably would have received but for the harm caused by Denley." It is undisputed that Academy received funding on a per pupil basis.

"Appellate review of factfinder's award of damages is limited. [Citation.] In the absence of error in the admission of testimony supporting a claim of economic damages . . . we affirm the judgment if substantial evidence supports the damage award." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1322.) "The law will allow reasonably calculated damages even if the result is only an approximation; the wrongdoer cannot complain if his own condition creates a situation in which the court must estimate rather than compute." (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 143.)

For purposes of this appeal, we accept the parties' undisputed premise that the per pupil payment from the state is analogous to profits. Lost profits is a measure of damages that applies to tort and contract cases. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883.) " '[A]lthough generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be show by

evidence of reasonable reliability.' " (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 774.) As Academy argues, new enterprises may estimate damages based on "economic and financial data, market surveys and analysis, business records of similar enterprises, and the like." (*Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 884.) Historical data as well may demonstrate lost profits of an established business. (*Guntert v. City of Stockton*, *supra*, 55 Cal.App.3d at p. 143.)

We now turn to Academy's argument that it presented evidence that it would have reached the projected enrollment figures identified in its charter petitions. First, Academy argues that "ample uncontested evidence supported the finding that LAAAE [Academy] would have reached 80 to 90 percent of its capacity but for the poor condition of the facility." In support of this statement, Academy cites to its counsel's argument that the facilities were deficient and to Dr. Luna's testimony that she relied on the expected student enrollment numbers in Academy's charter petitions.

Dr. Luna's assumptions about the expected student enrollment had no apt evidential support. First, counsel's argument is not evidence. (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.) Similarly, Dr. Luna's assumption that the deficient facilities caused the enrollment shortfall she blackboarded at trial is similarly bereft of evidential support.

Dr. Luna expressly testified that she did not analyze whether appellants' conduct caused the shortfall in student enrollment. She just assumed that was so.

Academy also relies on the trial court's statement that, "I also find Dr. Luna's analysis was credible and convincing. . . . I think that she has provided an adequate basis for the opinion that people just leaving for a variety of reasons, moving, et cetera, would be taken into account by virtue of the fact that the expected enrollment was at 90 percent of the capacity."

The trial court's analysis does not address the critical question here: Was there evidence to support Dr. Luna's assumption that Academy would have reached the student enrollment projected in Academy's charter petitions? Dr. Luna simply assumed the correctness of those enrollment projections. The fact that the court found Dr. Luna's calculations based on that assumption persuasive does not prove that any evidence supported the assumption.

Academy correctly points out "[t]he charter petition is a publicly filed document pursuant to which the school was authorized to operate" under Education Code section 47605. That statute requires a proposed charter school to estimate the number of pupils that will enroll, but is silent as to the basis for that estimation. (Ed. Code, § 47605, subd. (a)(1).) The mere fact that Academy was required to estimate the number of expected pupils does not provide evidence that Academy accurately estimated that number. Once again, Academy falls short of showing that Dr. Luna's assumption of expected enrollment was based on any evidence.

Principal Calvo also provided information on which Dr. Luna based her calculations. Calvo's testimony, however, did not provide substantial evidence. Calvo testified that a projected enrollment figure comes from "neighborhood trends as well as what is reasonable growth. Oftentimes you're able to easily

surpass that, and sometimes there are neighborhood challenges which may delay that. But in theory, once you build to a certain capacity, then you should be able to provide a programming to meet that need. And in our community . . . [Academy] used to be the only charter school in the community, and now there are several. So it is an evident need in the community, and families are seeking charter school options."

To the extent Calvo provided general information on how a projected enrollment figure is determined, that testimony is not probative of the reasonableness of Academy's projections in its charter petitions. Calvo, moreover, acknowledged that these projections are often inaccurate. According to Calvo, "neighborhood challenges" could delay reaching an expected projection. There was uncontradicted evidence from Calvo that since at least some of the projections, new charter schools started competing with Academy for students in the same community. Additionally, Esparza acknowledged that students left for "various reasons" including some that left the country. Esparza testified that he had not studied the projections.

Although Principal Calvo concluded that the anticipated student enrollments were "viable," his conclusion is not supported by evidence. There was no evidence of who provided the projections in the petitions. There was no evidence of the qualifications of that person or persons to project student enrollment accurately. The record does not show the method used to calculate the projections. There was no evidence of the facts underlying the projections. There was no evidence that the projections considered the undisputed fact that additional charter schools opened nearby. There was no evidence of "financial data, market surveys and analyses, [or] business records of similar

enterprises." (See *Kids' Universe v. In2Labs*, *supra*, 95 Cal.App.4th at p. 884.) Nor was there any historical data demonstrating that Academy generally met the projections identified in its charter petitions.

Dr. Luna calculated what Academy's "profits" would have been if Academy's projected enrollments were achieved (discounted by the daily attendance factor). The problem, however, is that the record provided no basis to infer that Academy would have achieved the enrollment projected in their charter petitions absent deficiencies in the building.

A critical assumption to Dr. Luna's damages analysis was that the difference between the student enrollment projected in the charter petitions and actual student enrollment must have been caused by the deficient HVAC. Dr. Luna did nothing to test this assumption; she just adopted it. As previously noted, none of the fact witnesses did any analysis to support the assumption. Indeed, they testified that there could be many causes for a student not to return to Academy.[5] Because substantial evidence

---

[5] To the extent Academy is arguing that the fact its enrollment numbers improved prior to 2008 is indicative that it would have continued to grow but for appellants' conduct, the argument is not persuasive. Although Academy signed a new lease in 2008, it had occupied the premises since 2006. Exhibit B to the 2008 lease included the following: "The HVAC has not yet been repaired to full working order. Air flow in all parts of the building, including classrooms, lavatories, offices and hallways continues to be deficient. Installation of thermostats is required." The fact that Academy's enrollment grew while it was located on the premises and at a time when it was recognized that the HVAC system was not functioning undermines Academy's argument that appellants' conduct caused it harm.

did not support this critical assumption to Dr. Luna's opinion on the facilities deficiencies damages, her opinion could not constitute substantial evidence and we must reverse the trial court's award of those damages.[6] (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135–1136; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 338–339.)

An expert's opinion based on an assumption with no evidentiary support has no evidentiary value. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) "Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an 'expert opinion is worth no more than the reasons upon which it rests.' " (*Ibid.*) Here, Dr. Luna's opinion, which rested only on unsupported assumptions, was insufficient to support the deficient facilities damage award.

C. Appellants Demonstrate No Error in the Trial Court's Award of Lost Rental Value Damages

Appellants argue that we should reverse the trial court's award of $400,365 award (plus interest) for lost rental value damages because Dr. Luna's opinion as to those damages was not based on appropriate comparables data. Appellants' premise is that Dr. Luna should have compared rent for other schools, not

---

[6] Academy's argument that appellants forfeited their challenge to the sufficiency of the evidence by failing to summarize the evidence favorable to the judgment lacks merit. In their briefing, appellants extensively and precisely summarized the factual background.

other office buildings. The argument is unpersuasive because Academy rented space in an office building, not a school. Moreover, appellants' implicit premise that the rental rate of a school facility would be higher than an office building is not supported by any evidence.

Appellants also argue that because the HVAC system occasionally functioned, we should reverse the lost rental value damages award. This argument is of no avail. The overwhelming and undisputed evidence indicated that the classrooms were too hot in the summer and too cold in the winter, rendering the building comparable to one without air conditioning. Board members Esparza and Orci testified that the HVAC system did not work, and students and staff regularly complained. Principal Calvo and Teacher Cheek testified that the HVAC system did not work and caused students difficulty in focusing. Pasten, who worked in the same building, testified it was hot in the summer and cold in the winter. Administrative Assistant Solis testified that there was no air conditioning and it was extremely cold in the winter.

Even appellants' witness, David Bolour, testified that school personnel regularly contacted him about air conditioning problems. Bolour was aware that a student suffered from heat stroke because of the extreme heat in the facility. Bolour testified that he had information that the air conditioner had exceeded its lifespan. He admitted that the system did not meet classroom needs.

The fact that Academy contracted for a building with a functional HVAC system is undisputed and supported by exhibit B to the lease identifying the HVAC as "unacceptable." The evidence overwhelmingly supported the conclusion that

Academy received a building lacking a functioning HVAC system. As the trial court found, Academy was paying for an air-conditioned building and "basically" had a "nonair-conditioned building." In sum, ample evidence supported the trial court's award of lost rental damages.[7]

D. We Need Not Consider Appellants' Remaining Arguments on Damages

Given our reversal of the deficient facilities damages award for insufficient evidence, we need not consider appellants' argument that these damages are duplicative of the lost rental damages award.

We also need not consider appellants' argument that the trial court should have reformed the lease to bar Academy's claim for consequential damages. We have reversed the only consequential damages the trial court awarded.

E. Attorney Fees

Appellants do not contest the amount of attorney fees the trial court awarded to Academy except to the extent it did not reflect a $175,000 rent credit. Since appellants filed their opening brief, they have received that credit, and the issue is moot. We therefore do not consider it.

---

[7] In a footnote, appellants state the trial court calculated interest on the rental damages at a 10 percent rate in contrast to the 7 percent rate used by Academy's expert. Appellants do not challenge this interest award on appeal.

F. Appellants Demonstrate No Prejudice from the Trial Court's Denial of a Statement of Decision

The parties dispute whether appellants timely requested a statement of decision, but they correctly recognize that reversal is warranted only if prejudice is shown from the trial court's failure to provide a statement of decision. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108–1109, 1116.) Because appellants fail to demonstrate prejudice, we need not consider whether appellants' request for a statement of decision was timely.

Appellants argue that they suffered prejudice because they could not determine the factual basis for the trial court's damages award. They state: "[T]o the extent the trial court's failure to issue a statement of decision prejudices Denley by impacting this Court's review of the sufficiency of the evidence supporting the award of damages, the case should be reversed and remanded with directions to prepare a statement of decision." This court has reviewed the entire record, and has considered appellants' challenge to the damage awards on the merits. Appellants therefore have not demonstrated prejudice from the absence of a statement of decision.

DISPOSITION

The deficient facilities damage award is reversed. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.